BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules	)	GC Docket No. 10-43
	)	
	)	

REPLY COMMENTS OF FREE PRESS

In this proceeding, the Commission seeks comment on the substance and scope of conflict-of-interest disclosure rules for written *ex parte* notices and other filings in Commission proceedings. In the *Further Notice*, the Commission notes the existence of a significant information disparity,[1] a problem well documented in this proceeding[2] and elsewhere.[3] Commission action to increase transparency in its decisionmaking processes is eminently warranted.

In initial comments, no parties raise legitimate opposition to the rules proposed in the *Further Notice*, and two parties strongly support them.[4] Two other parties offer comments on the proposed scope of the rules, requesting that the Commission exempt trade associations and similar groups from disclosure requirements.[5] Only the Chamber of Commerce seems opposed outright to additional disclosure and improved

[1] *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-11, ¶ 80 (rel. Feb. 2, 2011) (*Further Notice*).
[2] *See* Comments of Free Press at 4-6 (filed June 16, 2011) (Free Press Comments).
[3] *See, e.g.*, Eliza Krigman, "AT&T gave cash to merger backers," Politico (June 10, 2011), available at http://www.politico.com/news/stories/0611/56660.html.
[4] Free Press Comments at 1; Comments of Media Access Project at 1 (filed June 16, 2011).
[5] Comments of the Fixed Wireless Communications Coalition at 1-2 (filed June 16, 2011); Comments of the National Association of Broadcasters at 2-3 (filed June 16,

transparency, and the arguments raised by the Chamber are universally invalid or unpersuasive.

The Commission should move with all haste to adopt meaningful and balanced conflict-of-interest disclosure rules for all written Commission filings, and to apply the rules on a going-forward basis to all currently open proceedings.

I. As the Commission has already recognized, hidden conflicts of interest exist, and balanced intervention is warranted.

The problems of hidden conflicts of interest are very real, and Commission action is not only warranted but essential to promote transparency and informed participation in its proceedings. Sufficient evidence of the need for Commission action appeared in the original rounds of comments, and Free Press presented further evidence of hidden conflicts in its initial comments on the *Further Notice*, taken from one of the most high-profile and active proceedings currently before the Commission: the proposed acquisition of T-Mobile USA by AT&T.[6] The Chamber of Commerce closes its eyes to these problems,[7] but that doesn't make them go away.

The Commission should dismiss the Chamber's insistent refusals to engage in meaningful discussion of the proper scope and application of disclosure rules. The Commission did not ask in the *Further Notice* whether to impose a disclosure requirement, or whether there is a problem that justifies Commission action. In fact, based on the record developed in response to the original Notice of Proposed Rulemaking, the Commission has already concluded that appropriate disclosure rules are

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2011).

[6] Free Press Comments at 2-6.

[7] Comments of the U.S. Chamber of Commerce at 4-6 (filed June 16, 2011) (Chamber Comments).

justified by demonstrated information disparities between parties.[8] The Commission did not seek comment on its clearly stated position on the suitability of rules.[9] Instead, the *Further Notice* asks about the proper disclosure rule to adopt, and how to apply it.[10] In this context, the Chamber's attempts to deny the problem and categorically oppose additional transparency are misguided, unproductive, and unhelpful. Thus, although the Chamber raises several arguments against any proposed disclosure rules, all of those arguments are readily dismissible.

The Chamber appears to misunderstand the purpose of the rules, which is to require disclosure of financial or material contributions. This often occurs under circumstances that present significant incentives to hide conflicts of interest. The Chamber argues that in "most instances" participants in Commission proceedings will "make their identities clear" to "enhance their credibility and persuasiveness."[11] But disclosure of the identity of the filer is not the issue here; the issue is disclosure of contributions to the filer, and of the identities of the contributors.

The precise value of astroturf in Commission proceedings is to make the identity of the participant well known, while hiding any financial contributions that support that participation, to create a false perception of grassroots support for an industry agenda

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[8] *Further Notice* at ¶ 80 ("We agree that, although some interested parties may be knowledgeable about the identities of the 'parties behind the parties' supporting or opposing their positions, other parties and the general public may not be equally knowledgeable. We believe it would serve the public interest to have a disclosure requirement that addresses this problem….").

[9] In many notices of proposed rulemaking, the Commission offers one or more tentative conclusions, and seeks comment on those conclusions. Here, although the finding was not structured as a tentative conclusion, the Commission made a clear statement of its position. The Commission did not seek comment on this finding, although the Commission did invite commenters to address "any other issues they believe are relevant for consideration," *id.* ¶ 84.

[10] *Id.* ¶ 80.

item. Conflicts of interest in this context diminish the credibility and persuasiveness of the participant. Consequently, there are strong incentives to hide such information and good reasons for the Commission to uncover it.

Similarly, the Chamber underestimates the necessary cost of the Commission's time and labor in determining conflicts absent disclosure obligations, where such determinations are even possible.[12] In particular, distinguishing organizations that support industry agendas independently from those organizations that industry pays to support its agendas can be nearly impossible without voluntary or required disclosure of contributions and other conflicts. Because the conflicts of interest can be entirely hidden, it is not possible to identify organizations for reduced weight of emphasis or for further investigation—their conflicted or unclear interests will not be known.

Conflict-of-interest disclosure rules serve a valuable purpose of promoting open, transparent, and democratic processes at the Commission. This purpose is not related to the purpose of disclosure in court proceedings, which is to determine when judicial recusals are warranted.[13] The proposed rules are not about identifying bias, but about developing a complete and transparent factual record. Hidden conflicts of interest can skew the Commission's written record, the minds of media and advocates and staff reading that record, and ultimately Commission policy and decisionmaking. Because Commission rulemaking proceedings evaluate industry-wide rules and regulations, the importance of developing a full record, fair to all parties and faithful to the law, is paramount. The Chamber's contrary comment that establishing a high standard for

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[11] Chamber Comments at 6.

[12] *Id.* ("In addition, the FCC remains free not only to give less weight to arguments presented by a party whose interest in a proceeding is unclear but also to ask for more information on a case-by-case basis.").

conflict-of-interest disclosure rules "would defy logic"[14] is hyperbolic at best, itself illogical at worst.

II. Conflict-of-interest disclosure rules as proposed by Free Press are not overly burdensome.

Conflict-of-interest disclosure obligations as proposed by Free Press are not overly burdensome. Compliance would not require significant time or effort, only the repackaging of information already gathered by many parties. The rules impose no universal obligations and apply only to parties who voluntarily choose to make an *ex parte* presentation or other filing. Because the proposed disclosures would be minimal in substance, tailored in scope, and required only for Commission filings, the work involved is reasonable and not unduly burdensome.[15]

The Commission must establish the right rule to address the disclosure problems it faces, and not copy an existing rule for the illusion of convenience at the expense of effectiveness. The Chamber contends that if Commission disclosure rules are not identical to judicial corporate disclosure rules, they would be overly burdensome, largely because the Chamber would then have to ensure its compliance with "multiple" rules instead of just one.[16] But disclosure rules based solely on ownership would not capture *any* of the problems that this proceeding sets out to achieve, because conflicts of interest frequently exist without any equity relationship.[17]

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[13] *See id.* at 10.
[14] *Id.* at 10-11.
[15] *See* Free Press Comments at 8, 14-15.
[16] Chamber Comments at 11. Although two is indeed a multiple of one, the Chamber seems to believe that a Commission disclosure rule would immediately lead to "multiple agencies" adopting distinct disclosure rules, as it refers to "the individual disclosure rules of each of the many government agencies before which it advocates." *Id.* Such baseless slippery slope arguments should be dismissed.
[17] *See* Free Press Comments at 7; Reply Comments of Free Press, GC Docket No. 10-43,

Contrary to the Chamber's assertions,[18] a suitable disclosure rule would not discourage any legitimate participation in Commission proceedings. Certainly, as the Commission has previously noted and the Chamber approvingly references, excessive disclosure obligations could have an impact on participation.[19] But this is exactly why the *Further Notice* seeks to find the right balance between complete disclosure and minimal burden,[20] a balance that is appropriately struck by the disclosure rules proposed by Free Press in initial comments. Because the disclosure rules are not inherently burdensome, compliance cost will not be a significant disincentive to participate—neither to parties with conflicts nor those without—and the minor burdens of compliance are outweighed by the public benefit of increased transparency. The only disincentive will be to those parties who seek to participate in Commission proceedings while hiding conflicts of interest; and it is precisely this disincentive that the Commission rightly seeks to create. And if such parties actively seeking to hide such conflicts would rather not participate in Commission proceedings, they would not be required to make any disclosures.

Whether or not the rule as proposed would constitute a collection of information for purposes of the Paperwork Reduction Act,[21] the significant benefits conferred by meaningful disclosure of hidden conflicts of interest for improved transparency and democratic decisionmaking processes vastly outweigh the slight burden imposed by the proposed rules. The burden would require minimal effort and would exist only when a party voluntarily chooses to make an *ex parte* presentation or another written filing.

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at 5 (filed June 8, 2010).

[18] Chamber Comments at 14.

[19] *Id.*

[20] *Further Notice* ¶ 80.

[21] *See* Chamber Comments at 17 (arguing that the burden of disclosure rules is excessive for PRA purposes because of the "lack of evidence" of a problem).

III. Conflict-of-interest disclosure rules as proposed do not raise First Amendment concerns.

The proposed conflict-of-interest disclosure rules do not raise First Amendment concerns because they do not impose a speech restriction in violation of the First Amendment. The Chamber correctly notes that the right to petition a government agency is protected by the First Amendment.[22] The relevant question, therefore, is whether the proposed rule unduly burdens that right. It does not, because the ability to participate in an existing Commission proceeding does not receive the same protections as the right to speak or petition the government.[23]

A party's right to file in Commission proceedings is not an absolute right: the Commission can classify a proceeding as restricted and thereby forbid outside parties from filing any written comments or making any oral or written *ex parte* communications.[24] Because the Commission can choose to block parties from making filings, it should be clear that the Commission can choose to specify rules for making those filings—particularly rules that serve an established vital interest without imposing significant burden.

Even if participation in Commission proceedings is given stronger constitutional protection, suitable conflict-of-interest disclosure rules are permissible according to governing precedent. The proposed disclosure rules fall well short of the rules upheld by the Supreme Court in *Citizens United*.[25] The disclosure rules at issue in *Citizens United*

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[22] Chamber Comments at 14 n.28.

[23] A distinction may be made between the *original* filings of petitions or complaints, and filings of comments or other documents in *existing* proceedings. The former may be more readily classifiable as petitioning the government.

[24] *See* 47 C.F.R. § 1.1208.

[25] *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (upholding Federal Election Commission rule requiring producers of political advertisements to comply with

place a substantively larger burden than the proposed Commission conflict-of-interest disclosure rules.[26] And, as in *Citizens United*, the proposed rules are permissible because they do not impose any "ceiling" on Commission advocacy activity, nor prevent any party from speaking,[27] whether by giving money to another organization, or filing comments or *ex parte* communications with the Commission.

Commission conflict-of-interest disclosure rules are not clearly distinguishable from the Lobbying Disclosure Act for purposes of court review, as they apply a comparable burden in similar governmental contexts in an attempt to achieve the same goal of greater transparency. The Chamber does not distinguish the substance of the Commission's disclosure rules in any way. Instead, the Chamber argues that LDA rules are only permissible because they do not "encompass all participation in the legislative process," whereas *ex parte* disclosure rules would apply to a "wide variety" of participation in Commission proceedings.[28] The relevance of such a distinction is unclear. And in practice, given that industry and most other Commission participants would not need to modify their practices at all—because they do not have hidden conflicts of interest—the rules seem substantially less burdensome than LDA obligations, which apply to virtually all significant lobbyists active in legislative processes.

Nor can speculative discussions of "harassment," invoking dicta from *Citizens*

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strict disclosure rules).

[26] The rules required that disclosure include the identity of the entity responsible for televised political advertising content and a statement that the endorsed candidate did not authorize the communication. The rules also required that the disclaimer be displayed in a "clearly readable manner" for at least four seconds, and that any entity spending more than $10,000 on electioneering communications file a disclosure statement with the Federal Elections Commission, including information on the communication and names of certain contributors. *Id.* at 914.

[27] *See id.*

[28] Chamber Comments at 15-16.

United,[29] outweigh the benefits of improved transparency. Just as the public needs transparency in election spending and legislative advocacy, so too does the public need to know the true parties of interest in Commission filings. Greater transparency does not amount to universal burden or harassment. Regardless of whether a showing of a reasonable probability of harassment could be demonstrated in any hypothetical incidents,[30] such an argument does not eliminate the many benefits that can be achieved from disclosure rules, and would not support a facial challenge to the rules.

IV. The proper scope of conflict-of-interest disclosure rules must include all filings that become part of the Commission's record.

Conflict of interest disclosure rules must be applied equally to all filings that become part of the Commission's record, as all raise the same concerns. The Chamber claims that written comments filed in rulemaking proceedings "do not present the same policy issues regarding fair process" as oral *ex parte* communications.[31] According to the Chamber, the primary reason for the distinction is that written comments "are publicly available."[32] But written *ex parte* filings and notices of oral *ex parte* communication are equally publicly available through the Commission's online filing system. Notices of oral presentations are required to include thorough descriptions of what was discussed at the meeting—the Commission in fact recently raised the standard for such notices in the same item as the present *Further Notice*.[33] The same problems of hidden conflicts of interest are equally present no matter the format of the filing.

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[29] *See* Chamber Comments at 7-8 (alleging that some parties might be harassed if their hidden financial contributors are disclosed publicly, implying that such risk might result in the rules being unsupportable under *Citizens United*).
[30] *See id.*
[31] Chamber Comments at 13.
[32] *Id.*
[33] *Further Notice* ¶¶ 2-15.

V. Comprehensive conflict-of-interest disclosure rules must be applied immediately to all current and future proceedings before the Commission.

No valid opposition was raised to the Commission's proposal to adopt reasonable conflict-of-interest disclosure rules, and Free Press has suggested suitable rules that could be adopted to properly strike the balance between disclosure and burden. The Commission should move rapidly to adopt meaningful conflict-of-interest disclosure rules, and should apply them on a going-forward basis to all current and future proceedings, including the pending acquisition by AT&T of T-Mobile USA, for which multiple hidden conflicts have already been exposed.[34]

Respectfully Submitted,

/s/

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[34] Free Press Comments at 4-6.